draft article stipulates that the conduct of any State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. Paragraph 2 then goes on to clarify that for the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Draft Article 7 on the "Attribution to the State of the conduct of entities exercising elements of the governmental authority" stipulates that the conduct of an entity which is not an organ of the State under draft article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Draft Article 8 entitled "Attribution to the State of conduct in fact carried out on its instructions or under its direction or control" provides that the conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Draft Article 8 *bis* then goes on to provide for the "attribution to the State of certain conduct carried out in the absence of the official authorities". The draft article lays down that the conduct of a person of group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Draft Article 9 entitled "Attribution to the State of the conduct of organs placed at its disposal by another State" stipulates that the conduct of an organ placed at the disposal

of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Draft Article 10 on the "Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions" provides that the conduct of an organ of a State or of an entity empowered to exercise elements of the government authority, such organ or entity empowered to exercise elements of the government authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

As stated earlier, the Special Rapporteur has proposed the deletion of draft articles in 11 to 14 as adopted on first reading. It will be recalled that draft article 11 was addressed to the "conduct of persons not acting on behalf of the state; Draft articles 12 to 14 were entitled "conduct of organs of another state"; "conduct of organs of an international organization"; and the "conduct of organs of an insurrectional movement" respectively.

Draft Article 15 on the "Conduct of an insurrectional or other movement" comprises of three paragraphs. Paragraph 1 of draft article 15 provides that the conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

Paragraph 2 of draft article 15 then goes on to stipulate that the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international Law. Paragraph 3 of the draft article is of the nature of a saving clause and reads "This article is without prejudice to the attribution to a State of any conduct, however related to that of

the movement concerned, which is to be considered an act of that State by virtue of articles 5 to 10".

It may be mentioned that the original title of draft article 15 had read "attribution to the state of the act of an insurrectional movement which becomes the new government of a state or which results in the formation of a new state".

Draft Article 15 *bis* relating to "conduct which is acknowledged and adopted by the State as its own" lays down that conduct which is not attributable to a State under draft articles 5, 7, 8, 8 *bis*, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Draft Article A entitled "Responsibility of or for conduct of an international organization" provides that these draft articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization. The Commission will take decision as to the place of draft article A at a later stage of the second reading of the draft articles.

The Commission has invited the views of the General Assembly on whether, with respect to part One of the draft articles, the conduct of an organ of a State is attributable to that State under draft article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct?

As regards Part Two of the draft articles, the Commission has sought guidelines as to the appropriate balance to be struck between the elaboration of general principles concerning reparation and the more detailed provisions relating to compensation?

II. International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law

The Commission at its 48th Session, it will be recalled, had decided to transmit the report of the Working Group on "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", consisting of a set of 23 draft articles. The General Assembly at its fifty first session had urged Governments to provide their comments and observations on the report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law annexed to the report of the International Law Commission in order that the Commission may, in the light of the report of the Working Group and such comments and observations as may be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon.

The Commission at its forty-ninth session resumed its work in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm and established a Working Group which *inter alia* recommended that the Commission appoint a Special Rapporteur. The Commission accordingly appointed Dr. P.S. Rao, Special Rapporteur, for "Prevention of Transbounary Damage from Hazardous Activities".

The Commission at its 49th Session had decided to divide the topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited By International Law into two parts. It had decided to first address the "Problem of Prevention of Transboundary Effects of Hazardous Activities" and then consider the "Question of Liability".

The Commission at its Fiftieth Session considered the First Report of the Special Rapporteur, Dr. P.S. Rao.[6] The Report on the "Prevention of Transboundary Damage from Hazardous Activities" was divided into three parts, the first of which dealt with the Concept of Prevention and Scope of the Draft Articles. In this report Dr. Rao had emphasized that the Commission's work on the subject of prevention be placed in the context of sustainable development for it was in the broader context of sustainable development that the concept of prevention had assumed great significance and topicality. The objective or prevention of transboundary harm arising from hazardous activities had been incorporated in Principle 2 of the Rio Declaration and confirmed by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons as forming a part of the corpus of international law.

Introducing his report the Special Rapporteur, Dr. P.S. Rao, stated that prevention should be a preferred policy because, in the event of harm, compensation often could not restore the situation that had prevailed prior to the event or accident. The discharge of the duty of prevention or due diligence was all the more necessary as knowledge regarding the operation of hazardous activities, materials used, the process of managing them and the tests involved was steadily growing. From a legal standpoint, the enhanced ability to trace the chain of causation and even when several intervening links existed made it imperative for operators of hazardous activities to take all necessary steps to prevent harm. The European Commission, which had drawn up several sophisticated schemes for prevention of transboundary damage, had emphasized that a growing economy was a necessary precondition for sustainability in that it created the resources needed for ecological development, the restoration of environmental damage and the prevention of future harm.

[6] A/CN,4/487 and Add.1.

Part Two of the Reparation Prevention of Transboundary Damage from Hazardous Activities addressed the issues relating to the "Concept of Prevention: Principles of Procedure and Content". Section 1 of Part Two of the Report identified five principles of Procedure viz. (I) the principle of prior authorization; (ii) the principle of international environmental impact assessment; (iii) the principles of Cooperation, exchange automation of information, notification, consultation and negotiation in good faith; (iv) the principle of dispute prevention or avoidance and settlement of disputes; and (v) the principle of non-discrimination.

Section 2 of Part Two of the Report set out three principles of content viz. (i) the principle of precaution; (ii) the polluter pays principle and (iii) the principles of equity, capacity building and good governance. It may be mentioned that the principle of equity had two components namely intra-generational equity, and inter-generation equity.

The texts of the draft articles adopted on first reading at the Fiftieth Session address the first set of problem, that is, the question of prevention.[7] The Special Rapporteur for prevention of transboundary effects of hazardous activities, Dr. P.S. Rao had proposed a complete set of articles on the subject, a total of 17 articles. The articles were basically drawn from the articles worked out by the 1996 Working Group of the Commission.

Many of these draft articles and the ideas developed in them had already been worked out by the Drafting Committee from 1993, and in1996 the work was completed on the topic. The commentaries to the articles, which were completed in1996, carefully explain the scope of each article and the important criteria, which are essential to the understanding of the articles.

[7] See Document A/CN.4/L.554 Add.1.

Draft article 1 defines the scope of the articles. It is identical to paragraph (a) of article 1 of the 1996 Working Group draft and limits the scope of the draft articles to activities not prohibited by international law which create a risk of causing significant transboundary harm through their physical consequences. The text of the draft article incorporates three criteria. The first criterion refers to "activities not prohibited by international law" and is crucial in drawing a distinction between the articles of this topic and that of State responsibility.

The Second criterion is that the activities to which preventive measures are applicable bear a risk of significant trnsboundary harm. The element of risk is intended to exclude from the scope of activities, which in fact cause transboundary harm in their normal operation (such as creeping pollution). The element of transboundary harm is intended to exclude activities which cause harm to the territory of the State within which the activity is undertaken, or those activities which harm the global commons *per se* but do not harm any other State. The phrase "risk of causing significant transboundary harm" should be taken as a single term, as it is defined in draft article 2.

The third criterion is that the significant transboundary harm must have been caused by the physical consequences of such activities. This understanding is consistent with the long standing view of the Commission that this topic should remain within a manageable scope and that it should exclude transboundary harm which might be caused by policies of States in economic, monetary, socio-economic or similar fields. The activities should therefore have physical consequences which in turn result in significant harm.

The title of the draft article 1 remains unchanged from the title adopted in the 1996 text. There would appear to be a discrepancy between the title of the draft articles and their scope as defined in draft article 1. This is a matter that the Commission will eventually have to resolve at some point. The draft articles come under a sub-topic of International liability

for injurious consequences arising out of acts not prohibited by international law and therefore they deal in fact with activities not prohibited by international law. However if the draft articles are to stand on their own, then the title of the topic would need to be brought in line with the scope of the draft articles.

Draft articles 2 on "Use of terms defines five terms commonly used in the draft articles. While four of these terms i.e. those in subparagraphs (a), (c) and (d) are identical to the terms used in draft article 2 of the 1996 text, the definition of the term 'harm "in subparagraph (b) is new.

Subparagraph (a) of draft article 2 defines the concept of "risk of causing significant transboundary harm as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm". The adjective "significant" applies to both risk and harm. For the purposes of these articles, "risk" refers to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It is therefore the combined effect of those two elements that sets the threshold: the combined effect should reach a level that is deemed significant. The word "encompasses" is intended to highlight the fact that the spectrum of activities covered is limited and does not, for example include activities where there is a low probability of causing significant transboundary harm.

While subparagraph (b) is new it does not, strictly speaking, provide a definition of the term "harm". It provides a scope for harm in that it indicates that harm includes "harm caused to persons, property or the environment". It is a useful clarification of the text.

Subparagraph (c) defines "transboundary harm as meaning "harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned shared a common border. The definition is self-explanatory and makes it clear that the articles do not apply to circumstances where harm

affects the "global commons" *per se*. It includes, however, activities conducted under the jurisdiction or control of a state, for example on the high seas, with effects in the territory of another State or in places under the jurisdiction or control of a State with injurious consequence on, for example, ships of another States on the high seas.

Subparagraph (d) defines the "State of origin" as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article I are carried out.

Finally subparagraph (e) of draft article 2 defines "State likely to be affected" as the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over the place where such harm is likely to occur. The Drafting Committee changed the tense of "has occurred" of the 1996 draft to "is likely to occur" which seems more appropriate in the context of prevention. There may be more than such State likely to be affected in relation to any given activity.

Draft article 3 entitled "Prevention" imposes on the State duty to "take all necessary measures to prevent and minimize the risk of significant transboundary harm". It sets forth the general obligation of prevention on which the entire set of draft articles is based. While drafted along the lines of draft article 4 of the 1996 text, the present provision departs from the 1996 text in that it does not deal with the obligation to take all appropriate measures to minimize the effects of harm once it has occurred, as the Drafting Committee considered that this related to the liability aspect of the topic.

The obligation to take effective necessary measures could involve, *inter alia*, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent harm, which has a risk of causing serious or irreversible damage. This is articulated in the Rio Declaration and is subject to the capacity of States concerned. It is realized that a more optimum and

efficient implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in draft article 5.

Draft article 4 entitled "Cooperation", is also based on a corresponding article of the 1996 text. However, once again, the issue of the minimization of the effects of harm that has occurred was considered to be outside the scope of the present exercise. Accordingly, the text requires the States concerned to cooperate in good faith and to seek the necessary assistance of one or more international organizations in preventing or in minimizing the risk of significant transboundary harm.

The commentary clarifies that the organizations referred to in this article are those which have the competence to assist the States concerned in preventing, or in minimizing the risk of, significant transboundary harm and that in addition to providing such assistance, international organizations can provide a framework for States to fulfill their obligation of cooperation in the field of prevention under this article.

Draft article 5 entitled "Implementation" is based on article 7 of the 1996 draft and retains the title. It states that a State Party to the draft articles would be required to take the necessary measures to implement them. Such measures may be of legislative, administrative or other character. Such measures include the establishment of suitable monitoring mechanisms to implement the provisions of the present draft. In this the provision emphasizes the continuing character of the duty under these draft articles.

Draft article 6 entitled "Relationship to other rules of international law" is in effect a simplified version of article 8 of the 1996 draft. It makes it clear that the present draft articles are without prejudice to the existence, operation or effect of any other rule of international law, whether treaty-based, or based on customary international law, relating to an act or omission to which these draft articles might otherwise – in the absence of such an obligation – apply.

Draft article 7 is entitled "prior authorization". Introducing his Report the Special Rapporteur, Dr. P.S. Rao had stated that the requirement of prior authorization of an activity that involved a risk of causing significant transboundary harm implied that the granting of such authorization was subject to the fulfillment of certain conditions to ensure that the risk was properly assessed, managed and contained. The requirement obligates States to put in place appropriate monitoring machinery to ensure that the risk bearing activity was conducted within the prescribed limits and conditions.

The first part of paragraph 1 of draft article 7 sets forth the basic rule that activities within the scope of the draft articles require the prior authorization of the State of origin. The Drafting Committee felt it necessary to also spell out in that sentence an element that was previously included in the commentary to the corresponding article 9 of the 1996 text, namely that prior authorization is also required for a major change planned in a hazardous activity that has already been authorized. As explained in that commentary, a "major change" would be one that increases the risk or alters its nature or scope.

The second sentence of paragraph 1 addresses a different type of change, namely one that transforms an activity without risk into one that involves a risk or transboundary damage. The Drafting Committee deleted the qualified "major" which existed in the 1996 text, since any change that would result in an activity falling within the scope

of the draft articles would trigger the requirement of prior authorization.

Paragraph 2 of draft article 7 deals with those activities within the scope of the draft articles already carried out before these articles become applicable. It will be recalled that under the 1996 draft, this issue was addressed in a separate article, i.e. article 12. The proposal by the Special Rapporteur was couched in more general terms than the 1996 provision which spelled out the various procedural steps involved. The Drafting Committee introduced two changes in the Special Rapporteur's text viz. (I) it deleted the word "prior" which was not considered appropriate in the context of a pre-existing activity; and (ii) it deleted the reference to paragraph 1 which could be misinterpreted as the two paragraphs deal with entirely different situations.

The Drafting Committee deemed it important to include a provision dealing with the consequences of the operator's failure to conform to the requirements of the authorization. Indeed, the rule of prior authorization embodied in this article would lose much of its practical effect if the State of origin did not also have the obligation to ensure that the activity was carried out in accordance with the conditions established by that State when authorizing the activity. The manner in which this obligation is to be fulfilled is left to the discretion of States. Paragraph 3 of draft article 7 indicates, nevertheless, that in some cases the operator's action may result in the termination of the authorization.

Draft article 8 entitled "Impact Assessment" is based on draft article 10 of the 1996 text. Draft article 10, it will be recalled was entitled "Risk Assessment". It basically provides that before granting authorization for an activity within the scope of the present draft articles, there must be an assessment of the transboundary impact of the activity. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it must take. The question who should conduct the assessment is left to States. The article

does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead.

Draft Article 9 on "Information to the Public" is based on article 15 of the 1996 text. It requires that States provide the public likely to be affected with information relating to the risk of harm that might result from an activity subject to authorization, in order to ascertain their views. This article is inspired by the new trends in international law of seeking to involve in the State's decision-making processes, those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions. The obligation contained in the article is circumscribed by the phrase "by such means as are appropriate". This phrase gives the choice of the means by which information can be provided to the public. The title of the article remains the same as the 1996 text.

Draft Article 10 on Notification and Information corresponds to article 13 of the 1996 text. It addresses a situation where the assessment conducted under article 8, indicates that the activity planned does indeed have a risk of causing significant transboundary harm. This article together with articles11 and 12, provides for a set of procedures which are essential in attempting to balance the interests of all the States concerned by giving them reasonable opportunity to find a way to undertake reasonable preventive measures.

The basic idea of this provision is the duty of the State of origin to notify those States that are likely to be affected by the activity that is planned. The text is slightly different from that of draft article 13 of the 1996 text. As the Chairman of the Drafting Committee, Mr. Bruno Simma pointed out, it transfers an idea from the commentary to draft article 13 into the text. The State of origin is now required *"pending any decision on the authorization* of the activity, [to] provide the State likely to be

affected with timely notification" of that activity. The 1996 text had employed the term "without delay".

As regards the timing within which a response from the States likely to be affected should be forthcoming, the 1996 text provided that in its notification, the State of origin should indicate time within which a response would be required. Under the new draft, there is no such requirement. In accordance with paragraph 2, the States likely to be affected should provide a response within "a reasonable time". Again this formula was considered more flexible.

The expression "reasonable time" so far as it applies to prescribed time limits for procedures before undertaking an activity, should be interpreted in the following manner; that no authorizations may be granted prior to the lapse of the so-called "reasonable time".

Draft article 11 entitled "Consultations on preventive measures", which is based on corresponding article 17 of the 1996 text. It deals with the question of the consultations between States concerned in respect of measures, which should be taken in order to prevent the risk of causing significant transboundary harm, and attempts to strike a balance between two equally important considerations. First, it is to be kept in mind that the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking adequate preventive measures. The draft article provides, neither a mere formality which the State of origin has to go through, with no real intention of reaching a solution acceptable to the other States, nor a right of veto for the State that is likely to be affected. To maintain such a balance, it places emphasis on the manner in which, and the purpose of which, the parties enter into consultations. They must do so in good faith and taking into account each other's legitimate interests.